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No. 82-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of the parties[1] in support of Respondent Shell Oil Company ("Shell").

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and

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[1] Their consents have been filed with the Clerk of the Court.

requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the court's consideration in the instant case—*i.e.*, the appropriate standards for the issuance of a valid EEOC Commissioner's charge.

Because of its interest in such issues, EEAC has been permitted to participate in numerous other cases in this Court involving substantive and procedural issues under Title VII. *See, e.g., Ford Motor Co. v. EEOC*, 102 S. Ct. 3057 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In addition, EEAC filed an amicus curiae brief on the issues presented in this case in the Sixth Circuit in *EEOC v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982).

STATEMENT OF THE CASE

On September 27, 1979, then Commissioner Norton issued a Commissioner's charge against Shell alleging that the company had violated Title VII of the Civil Rights Act of 1964, as amended, by discriminating against

women and blacks at its Wood River, Illinois refinery.[2] The charge alleged discrimination in recruitment, hiring, selection, job assignment, training, testing, promotion and other terms and conditions of employment. The charge did not include the dates of the alleged violations nor did it set forth any specific facts underlying the charge.

After unsuccessful attempts by Shell to obtain from the Commission additional information surrounding the charge, the Commission issued an administrative subpoena on May 15, 1980 seeking extensive information regarding Shell's employment practices. After unsuccessfully petitioning the Commission for modification of its subpoena, Shell filed suit in the Eastern District of Missouri seeking a declaratory judgment that the Commissioner's charge failed to comply with the requirements of Section 706(b) of Title VII, as amended, 42 U.S.C. § 2000e-5(b).[3]

Commissioner Norton amended the charge on January 16, 1981 to state that she had "reason to believe" that Shell had engaged in the unlawful practices "on a continuing basis from at least July 2, 1965."[4] Thereafter, EEOC filed suit in the Southern District of Illinois to enforce its administrative subpoena. Following the trans-

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[2] The charge is set forth in full in the Appendix to the Commission's petition for a writ of certiorari ("Pet. App.") at 44a.

[3] Section 706(b) reads in relevant part as follows:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (*including the date, place and circumstances of the alleged unlawful employment practice*) on such employer . . . within ten days and shall make an investigation thereof. Charges shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires (emphasis added).

[4] The amended charge is set forth in Pet. App. at 47a.

fer of the Commission's suit to the Eastern District of Missouri and its consolidation with Shell's action, the district court, in an opinion reported at 523 F. Supp. 79, enforced the Commission's subpoena.

The Eighth Circuit held that the Commissioner's charge did not meet the "date" and "circumstances" requirements of Section 706(b) (Pet. App. 1a-14a). The court held that the use of July 2, 1965, the effective date of Title VII, did not meet the "date" requirement of Section 706(b) since it did not give sufficient notice to Shell of the scope of the investigation. *Id.*, at 11a. The court found no "factual basis" in the use of the effective date of the Act. With regard to the "circumstances" requirement of Section 706(b), the court held that the general allegations of discrimination in the charge did not meet the requirements of Section 706(b) because they were not supported by any "factual or statistical bases" (Pet. App. 12a).

SUMMARY OF ARGUMENT

In the absence of a valid charge of discrimination, EEOC is without power to commence an investigation or to issue an administrative subpoena. The failure of the instant Commissioner's charge to comply with the mandatory provisions of § 706(b) and the other charge-filing provisions of Title VII rendered the charge herein legally defective and the underlying subpoena unenforceable.

Title VII places specific and mandatory requirements on the issuance of a charge of discrimination by a Commissioner of the EEOC. Former § 706(a) of Title VII required that a Commissioner's charge set forth the facts on which it is based and that it be based on "reasonable cause" to believe the Act had been violated. It is clear from the legislative history that Congress intended that requirement to operate as a safeguard against agency "fishing expeditions" and other administrative abuses in connection with the issuance of Commissioner's charges. *Graniteville Co. v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971).

The requirements for the issuance of a Commissioner's charge were made even more stringent when Congress replaced § 706(a) with the current § 706(b) in 1972. The 1972 Amendments specifically require the Commissioner to give the charged party notice of the "date, place and circumstances" of the alleged violations rather than merely to set forth the "facts" upon which the charge is based. Courts have interpreted the 1972 amendments as imposing a stricter burden on EEOC for the issuance of Commissioner's charges. *EEOC v. Appalachian Power Co.*, 13 FEP Cases 1294, 1295 (W.D. Va. 1976), *aff'd*, 568 F.2d 354 (4th Cir. 1978); *New Orleans Public Service, Inc. v. Brown*, 369 F. Supp. 702, 708 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975). Since the requirements of § 706(b) are mandatory, the failure of EEOC to adhere to these requirements renders the charge legally defective and the subpoena unenforceable.

The failure to include a good faith estimate of the probable time periods for the alleged discrimination renders the charge defective and the subpoena unenforceable. *EEOC v. Dean Witter Co., Inc.*, 643 F.2d 1334, 1338 (9th Cir. 1980); *EEOC v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982). The inclusion of a good faith estimate of the probable time periods for the alleged violation is critical, since EEOC is entitled to have access only to information that is "relevant and material" to the charge being investigated. *Dean Witter*, 643 F.2d at 1338. Such a good faith estimate of the probable time periods of a violation must be based on the particular facts underlying the charged party's employment practices.

The instant Commissioner's charge does not contain a good faith estimate of the probable time periods, because the use of the effective date of the Act provides neither sufficient notice to the employer nor a sufficient frame-

work for a court to determine the relevancy of information requested pursuant to a subpoena. In addition, the charge failed to include sufficient information to determine whether the alleged violations continued to within 180 days of the charge. *See EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245 (M.D. Ala. 1980). Since the Commission apparently relied on employment data covering only the period up to the end of 1978, it could *not* have had sufficient information to indicate that the alleged violations were continuing to within 180 days of the charge, which was issued in September 1979. Since the instant charge failed to provide a good faith estimate of the date of the alleged violations, the charge was defective and the subpoena issued pursuant to the charge was unenforceable.

The statement of broad generic forms of discrimination set forth in the instant charge also failed to meet the "circumstances" requirement of Section 706(b). Such an "across-the-board" charge, without any supporting factual or statistical basis, is inconsistent with the plain meaning of Section 706(b) and the Commission's own regulations, and fails to provide the notice contemplated by the "circumstances" requirement. The Eighth Circuit correctly determined that the "circumstances" requirement of Section 706(b) requires the Commission to set forth some factual basis for the charge. Without such a factual basis, a Commissioner's charge is not sufficient to advise the charged employer of the alleged violations and does not provide any factual framework within which a court can determine whether the agency acted within the scope of its authority and whether the subpoena should be enforced. Reasonable notice of the factual basis for the charge, as the Eighth Circuit has required, should not prove to be unduly burdensome to the Commission and will provide the meaningful notice to the employer which Congress envisioned.

ARGUMENT

I. THE COMMISSIONER'S CHARGE HEREIN WAS NOT LEGALLY SUFFICIENT TO MEET THE SPECIFIC, MANDATORY REQUIREMENTS UNDER TITLE VII FOR THE ISSUANCE OF A CHARGE OF DISCRIMINATION BY AN EEOC COMMISSIONER, AND THE SUBPOENA ISSUED PURSUANT TO THE CHARGE WAS UNENFORCEABLE

Title VII requires that an EEOC Commissioner's charge of employment discrimination include the date, place and circumstances of the alleged unlawful practices and that it be in writing under oath or affirmation of the Commissioner. As noted below, these requirements are mandatory and must be fulfilled before a Title VII investigation by EEOC may commence and before an EEOC administrative subpoena may issue. The Commissioner's charge at issue herein was legally defective because of its failure to adhere to these requirements, and thus EEOC was without authority to commence the instant investigation. The date set forth in the amended Commissioner's charge is legally insufficient since it was not a good faith estimate of the probable time periods during which the alleged violations occurred. In addition, the general conclusions of discrimination set forth in the charge do not provide a basis for the Commissioner to swear under oath or affirmation that the broad charges were true, nor do they meet the "circumstances" requirement of Section 706(b).

A. Title VII contains specific, mandatory requirements for the issuance of a charge of discrimination by an EEOC Commissioner

Since its enactment in 1964, Title VII has placed certain specific and mandatory requirements on the issuance of a charge of discrimination by a Commissioner of the EEOC. Former § 706(a) of Title VII, 42 U.S.C. § 2000e-5(a), as enacted in 1964, provided in pertinent part as follows:

> Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (*and such charge sets forth the facts upon which it is based*) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge, provided that such charge shall not be made public by the Commission (emphasis added).

Thus, under § 706(a), to be valid, a charge filed by a member of the Commission had to be in writing, based on "reasonable cause to believe" the Act had been violated, and had to set forth in the charge the facts upon which it was based. Failure to fulfill any of these specific requirements rendered a Commissioner's charge defective.

It is clear that Congress intended § 706(a) to operate as a constraint on EEOC's discretion to issue Commissioner's charges. Thus, in discussing § 706(a), Representative Goodell stated:

> Mr. Chairman, I think the chairman will agree with me that *this is a section to protect us from errant and arrogant bureaucracy*—from an administrator running wild without any reasonable cause. * * * We very carefully provided that *there had to be reasonable cause to believe that there had been a violation before any administrator moved into the situation.*

Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (EEOC Compilation, printed by W.S. Hein & Co.) at 3313 (emphasis added). Similarly, Representative Celler stated:

> In other words, we want to be sure that before the member of the Commission acts, he has reasonable

> cause to believe a violation of the act occurred. *We want unequivocally to nail down that condition precedent* and, therefore, we provide for the additional language.

Id. (emphasis added).

Congress intended that EEOC, unlike many other administrative agencies, would be powerless to commence an investigation in the absence of a charge of discrimination by an alleged victim of discrimination or a valid charge of discrimination by a member of the Commission. *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978); *Stewart v. Core Laboratories, Inc.*, 460 F. Supp. 931, 938 (N.D. Tex. 1978); *New Orleans Public Service, Inc. v. Brown*, 369 F. Supp. 702, 712 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975).

In this regard, the Fourth Circuit in *Graniteville Co. v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971) stated that:

> Congress sought to control mere 'fishing expeditions' by requiring investigations to be preceded by the filing of a charge by a party claiming to be aggrieved or by a Commissioner *with sufficient prior information to have reasonable cause to believe* that a statutory violation had occurred. The amendment makes clear not that the EEOC may not subpoena all evidence that 'relates to any matter under investigation or in question,' but that *properly filed charges are the only 'matters' which can be 'under investigation or in question'* (emphasis added).

The Memorandum of Senators Clark and Case, the bipartisan floor managers of Title VII in the Senate, also acknowledged the need for a valid charge in order to trigger an investigation by stating that:

> It is important to note that the Commission's power to conduct an investigation can be exercised only after a *specific charge* has been filed in writing. In this respect, the Commission's investigatory power

> is significantly narrower than that of the Federal Trade Commission, 15 U.S.C. 43, 46, or of the Wage and Hour Administrator, 29 U.S.C. 211, who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrong-doing.

110 CONG. REC. 7212, 7214 (1964).

The requirements for the issuance of a Commissioner's charge were changed in 1972, when Congress replaced § 706(a) with the current § 706(b). In enacting § 706(b) in 1972, Congress *increased* the requirements for the issuance of a Commissioner's charge. The Ninth Circuit in *EEOC v. Dean Witter*, 643 F.2d 1334, 1337 (9th Cir. 1980), has stated with regard to the 1972 amendments that:

> The amended § 706(b) varies from its predecessor in three basic respects relevant here: (1) instead of needing 'reasonable cause,' a commissioner must make the charge 'under oath or affirmation;' (2) instead of stating in the charge the 'facts' upon which the charge is based, the Commissioner complainant 'shall serve a notice of the charge' including the 'date, place and circumstances' of the alleged employment practice; and, (3) the amended § 706(b) imposes the same charging requirements upon both the Commissioner and private complainants.

Other Courts which have interpreted § 706(b) have recognized that "[w]ithout doubt, this modification on the requisites, a charge under oath replacing a charge based on reasoned belief, for issuance of a commissioner's charge created a stricter burden." *New Orleans Public Service, Inc., v. Brown*, 369 F. Supp. 702, 708 (E.D. La. 1974), *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975). Likewise, in *EEOC v. Appalachian Power Co.*, 13 FEP Cases 1294, 1295 (W.D. Va. 1976), *aff'd*, 568 F.2d 354 (4th Cir. 1978), the court stated that:

> This heightened responsibility, a charge under oath replacing a charge based on reasonable belief, for

> issuance of a Commissioner's charge, certainly creates a stricter burden on the Commission [citations omitted], but that is the clear import of the language Congress placed in the Act in 1972.

See also Stewart v. Core Laboratories, Inc., 460 F. Supp. 931, 933 (N.D. Tex. 1978) (1972 amendment "requires the Commission to file charges 'upon an oath or affirmation,' rather than upon the less onerous requirement of 'reasonable cause' "). Since the requirements of § 706(b) are mandatory, *EEOC v. Appalachian Power Co., supra*, 568 F.2d at 355, any failure of the EEOC to abide by such requirements in issuing the Commissioner's charge renders the charge legally defective.

B. The instant Commissioner's charge failed to include a good faith estimate of the probable time periods of the alleged violations

Section 706(b), as well as the Commission's own regulation, require a Commissioner's charge to set forth the "date" of the alleged violations. Such notification is essential to advise the charged party of the relevant time periods of the alleged violations, and to establish a framework to aid a court in determining what information requested in a subpoena is relevant to the charge. It is clear that the use of the effective date of the Act gives no more additional notice than the Act itself, and does not serve adequately to inform either the charged employer or a court asked to enforce a subpoena, of the scope of the alleged violations. A number of courts which have addressed the issue have rejected Commission attempts to avoid the clear language and purpose of the "date" requirement.

In *Dean Witter*, the Commissioner's charge alleged employment discrimination by the company in the recruitment, hiring, assignment, promotion, training, and terms and conditions of employment for women and minorities. The charge itself contained no date on which the dis-

crimination was alleged to have occurred. EEOC sent the company a copy of the charge and a notice of the charge. On the notice of charge form, EEOC merely stated that the date of the alleged discrimination was "continuing." When the company refused to comply with EEOC's subpoena for information, EEOC sought judicial enforcement, which was denied by the district court. The Ninth Circuit held that § 706(b) mandated that a Commissioner's charge must include notice of the date of the alleged discrimination and that failure to include the date rendered the charge defective. The court stated that use of the term "continuing" may inform the employer "that the practices are continuing in the present but does not disclose whether the practices have occurred in the past, or at least, when they began in the past." *Id.*, at 1338. Since the underlying charge was defective, the court declined to enforce the subpoena.

The Ninth Circuit based its decision in *Dean Witter* on the fact that EEOC is entitled under § 709(a), 42 U.S.C. § 2000e-8(a),[5] only to information that is relevant and material to the charge being investigated. In finding that the dates of the alleged discrimination were necessary to a determination of relevancy and materiality, the Ninth Circuit stated:

> The dates of the alleged unfair practices bear directly on the relevancy of an EEOC enforcement subpoena. By disclosing the dates of the alleged practices under investigation, the EEOC will inform the charged party, as well as the court which is asked to enforce a subpoena, what the proper scope of the investigation should be timewise.

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[5] Section 709(a), 42 U.S.C. § 2000e-8(a), provides as follows:

> In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that *relates to* unlawful employment practices covered by this Title and is *relevant to* the charge under investigation (emphasis added).

643 F.2d at 1338. In *Dean Witter*, the court stated that where the agency is "uncertain about the temporal scope of the challenged practices . . . a good faith estimate of the probable time periods would be sufficient." 643 F.2d at 1338. This requirement of notice to the employer of the date of the alleged discrimination is consistent with EEOC's own regulations, 29 C.F.R. § 1601.12(a)(3), which require that a charge must include:

> A clear and concise statement of the facts, *including pertinent dates*, constituting the alleged unlawful employment practices (emphasis added).

The Eighth Circuit in this case held that the instant Commissioner's charge was deficient because it failed to comply with the requirements of § 706(b). The original Commissioner's charge in this case did not include a date, but rather stated that the alleged violations were "continuing." After the *Dean Witter* decision, the original charge was amended to allege that Shell had engaged in unlawful practices on a continuing basis from at least July 2, 1965, until the present. The Eighth Circuit specifically rejected EEOC's argument that the inclusion of July 2, 1965, as the beginning date of the alleged violations, was sufficient to meet the requirements of § 706(b). In doing so, the court stated that "[t]he purpose of disclosure of a beginning date is to protect the employer from an open-ended investigation by limiting discovery to matters relevant to the charge" (Pet. App. 11a) (citation omitted).

The Eighth Circuit held that a Commissioner's charge "should at least inform the employer of the approximate dates of the unlawful practices and include enough other information to more fully identify the information that has been used as a basis for the subpoena" *Id.* (footnote omitted). With regard to the "date" requirement of § 706(b), the court, in holding that the use of July 2, 1965, as the beginning date of Shell's alleged violation was not sufficient, stated:

> Use of the effective date of Title VII does not give notice to the employer of the parameters of the investigation. We read section 706(b) to require 'some basis in fact for the date alleged in the charge'. *EEOC v. K-Mart Corp.*, 526 F. Supp. 121, 125 (E.D. Mich, 1981). We find no factual basis in the EEOC's allegation of July 2, 1965, as the beginning date of the alleged Title VII violations. *Id.*, at 11a-12a.

Similarly, in *K-Mart*, the Sixth Circuit held that an amended Commissioner's charge that included a date of July 2, 1965 was not sufficient to meet the requirements of § 706(b). In so holding, the Sixth Circuit stated:

> We agree that the date requirement of 706(b) is not satisfied merely by including the effective date of Title VII in the charge. A charge alleging that the unlawful employment practices began on July 2, 1965 does not give the employer, the district court, or the EEOC's investigators any objective basis to determine the temporal scope of the investigation. 694 F.2d at 1063 (footnote omitted).

Citing *Dean Witter*, the Sixth Circuit also concluded that where there is uncertainty as to the temporal scope of the alleged unlawful practices, "EEOC should make a good faith estimate of the date the unlawful practices began." *Id.*, at 1064.

Thus, the decision of the Eighth Circuit in this case is supported by the decisions of the Ninth and Sixth Circuits in *Dean Witter* and *K-Mart*,[6] respectively, and by

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[6] The Seventh Circuit in *EEOC v. A.E. Staley Manufacturing Co.*, —— F.2d ——, 32 FEP Cases 279 (7th Cir. 1983) recently rejected an employer's challenge to the use of the effective date of the Act in a Commissioner's charge. In that case, the employer apparently had argued that the Commission had a *pro forma* policy of using the effective date of the Act. After a hearing, the district court accepted the statements of the Commission that there was no such *pro forma* policy and the Seventh Circuit determined that the district court determination was not clearly erroneous. However, the issue presented in the instant case is not whether the Commission has a *pro forma* policy of inserting the effective date of the

a plain reading of Section 706(b) and the Commission's own regulations. As set forth below, a "good faith estimate" of the date of the alleged violations must be based on an assessment of the facts underlying the employment practices of the charged party and otherwise must comply with the requirements for timely charges set forth under Title VII. Based upon the information in this charge, there simply is no way for a court to determine whether the date here was used in good faith. The use of the effective date of the Act in the instant charge thus was not sufficient to give the charged employer the type of meaningful notice required by Section 706(b).

The inclusion of a "good faith estimate of the probable time periods" is particularly important since § 706(e), 42 U.S.C. § 2000e-5(e), provides that "a charge under this section [§ 706] shall be filed *within one hundred and eighty days* after the alleged unlawful employment practice occurred" (emphasis added). Pursuant to the 1972 amendments to Title VII, § 707(e), 42 U.S.C. § 2000e-6(e), authorizes EEOC "to investigate and act on a charge of a pattern or practice of discrimination whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." However, § 707(e) provides that "[a]ll such actions shall be conducted in accordance with the procedures set forth in section 706 of the Act." In *EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1258-62 (M.D. Ala. 1980), the court held that "the clear language of § 2000e-6(e) [§ 707(e)] makes the 'procedures' of § 2000e-5 [§ 706] applicable to pattern or practice suits and that the 180-day period set out in § 2000e-5(e) [§ 706(e)] is one of those procedures." 490 F. Supp. at 1260. The inclusion of a good faith estimate of the probable time periods and "enough other information to more fully identify the information that has been used as the basis for the subpoena" (Pet. App.

Act, but whether whatever date is used is a good faith estimate of the probable time periods of the alleged violations that has some basis in fact.

11a) is crucial to a determination of whether the requirements of § 706(e) have been satisfied. It is insufficient merely to allege a "continuing" violation without setting forth a sufficient factual basis to indicate that the alleged violations are amenable to a continuing violation theory and that such alleged violations have continued to within 180 days of the charge.

An employer who may have engaged in unlawful employment practices which were not the subject of a timely charge is entitled to treat those past acts as lawful since "[a] discriminatory act which is not made the basis for a timely charge is the equivalent of a discriminatory act which occurred before the statute was passed." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Thus, unless EEOC can show that an actual violation continued to within 180 days of the charge, prior unlawful acts are "merely an unfortunate event in history which [have] no present legal consequences." *Id.* In fact, it is quite possible that an employer may have treated minorities and women in a wholy lawful manner for the 180 days immediately preceding a Commission's charge. In such an instance, the Commission could not demonstrate a continuing pattern or practice of discrimination. EEOC apparently has assumed that allegedly discriminatory acts which may have occurred in the past have necessarily continued up to the filing of the charge.[7]

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[7] This assumption has no basis in law, and is inconsistent with the "oath or affirmation" requirement of § 706(b), which requires that a Commissioner possess sufficient factual information to be able to swear under "oath or affirmation" that the charge is true. Such an assumption is equally as faulty as the assumption apparently relied upon by EEOC that a current pattern or practice charge implied that the discrimination had existed since the effective date of Title VII. This assumption was set forth in its "Petition by the Equal Employment Opportunity Commission for Rehearing and Suggestion for Rehearing En Banc" filed in *Dean Witter*:

> Until the decision in this case, the Commission had assumed that when any charge alleges a pattern and practice of current

Accordingly, whenever the Commission includes a date in a Commissioner's charge that is more than 180 days from the date the charge is filed, the agency should be required to demonstrate in the charge, through a factual or statistical showing, that the unlawful acts continued to within 180 days of the charge.

The statistical data that are set forth for the first time in the Solicitor's reply brief on petition for writ of certiorari demonstrate that Comissioner Norton apparently did *not* have sufficient information to be able to swear that the alleged unlawful practices continued to within 180 days of the issuance of the charge. The only statistical data set forth which relates to Shell's workforce covered the period through the end of 1978. Thus, there apparently was *no* statistical data on Shell's workforce or any hiring or other employment actions of the company ocurring within 180 days of the charge, that would enable Commissioner Norton to swear under "oath or affirmation" that any alleged unlawful employment practices had continued to within 180 days of the charge. Accordingly, since there was no factual basis for an allegation of a continuing violation, the instant charge was untimely, because it was not filed within 180 days of any conduct or practice about which the Commission had information.

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discrimination, the pattern and practice is alleged to have persisted since the effective date of Title VII: July 2, 1965. A commissioner or other person filing a charge alleging a pattern or practice of discrimination is unlikely to know when the employer began to discriminate. If Dean Witter now refuses to hire blacks, women and Hispanic-Americans, it can be fairly inferred that this is not a new policy; if it currently assigns women, and minorities to lower paying positions, a commissioner can reasonably infer that it has always done so. The pro forma insertion of the date "July 2, 1965" into a pattern and practice charge adds nothing that cannot already reasonably be inferred from a claim, say, that the employer *continues* to refuse to hire blacks or *continues* to assign them to menial jobs.

A requirement that the date set forth in a Commissioner's charge bear a relationship with the facts of the charged party's employment practices and otherwise comply with the charge-filing requirements of Title VII, does not impose onerous new pleading requirements on the Commission, nor does it demand an inquiry into the underlying merits of the charge and employer defenses at the subpoena enforcement stage. Rather, a requirement that EEOC should be held to its statutory and regulatory requirements merely will require the agency to conduct the reasonably thorough preliminary investigation contemplated by Congress before the charge is issued and to establish a good faith estimate of the probable date based on the facts ascertained in this preliminary investigation. Rather than interfering with the enforcement process, the narrowing of the charge and the subpoena to the relevant and probable time period should enable the agency to function more efficiently. Such a focusing of the Commission on the relevant time period will enable the Commission and the employer better to evaluate the validity of the charges and may encourage voluntary resolution without the need for contested litigation. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

C. The instant charge did not meet the "circumstances" requirement of Section 706(b) since it set forth no factual basis for the alleged violations

With regard to the requirement of § 706(b) relating to the "circumstances' 'of the alleged unlawful practices, the Eighth Circuit in this case held that the statement of circumstances must be supported by "some factual or statistical basis" (Pet. App. 12a). The court stated that "[a] charge which simply alleged discrimination in all areas of employment practice without some factual or statistical basis gives the appearance of a 'fishing expedition' and fails to give the employer sufficient notice." *Id.* (citation omitted). In summary, the court stated

that a valid Comissioner's charge should contain the following:

> the type of information upon which the charge is based; the approximate dates of the alleged unlawful employment practices; the nature of the charge (e.g., failure to hire, failure to promote, dismissal); and if an individual charge has been filed, the position of the aggrieved individual (e.g., applicant, employee, former employee). *Id.*

In so holding, the Eighth Circuit confirmed that mere "across-the-board" conclusory allegations of discrimination, as in the instant charge, are not sufficient to meet the "circumstances" requirements of Section 706 (b). Rather than mandating a "stringent pleading standard" as the Solicitor has argued (Pet. Br. 23), the decision of the Eighth Circuit merely requires the Commissioner to set forth sufficient facts in the charge to provide reasonable notice to the employer of the alleged violations. The decision of the Eighth Circuit is consistent with the plain meaning of the statutory language and with the Commission's own regulations, which require that a charge must contain "[a] clear and concise statement of the facts . . . constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3).

In the absence of some basis in fact for the allegations, it is impossible for the employer or a court to determine whether the Commissioner possessed sufficient information to be able to swear "under oath or affirmation" that the charge is true. As set forth above, the requirement in Section 706(b) that charges be "under oath or affirmation" imposed a more stringent burden on a Commissioner for the issuance of a Commissioner's charge than did the "reasonable cause" standard under former Section 706(a). The Eighth Circuit's requirement that the charge set forth a reasonable factual basis for the allegations of discrimination is consistent with the enhanced "oath or affirmation" requirement under Section 706(b),

and assures that the oath requirement indeed has some meaning.[8]

In *Dean Witter*, the Ninth Circuit stated that the "circumstances" requirement of Section 706(b) was satisfied by a "listing of the nature of the alleged employment practices, even though essentially conclusory in nature." 643 F.2d at 1337. Likewise, in *K-Mart*, the Sixth Circuit, in dictum, stated that "[w]e do not agree with the Eight Circuit's holding in *Shell Oil* that section 706(b) requires 'some basis in fact.'" 694 F.2d at 1063 n.7.[9] It is submitted, however, that this approach to the "circumstances" requirement of Section 706(b) adopted by the Ninth and Sixth Circuits neither provides adequate notice to the employer of the alleged violations nor does it provide the control on the Commission's investigatory authority which Congress sought to ensure.

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[8] The Solicitor has relied on a number of cases which were decided *before* the 1972 amendments to Title VII and which involved an interpretation of former Section 706(a) and not the requirements of the current Section 706(b). *See, e.g.*, cases cited at Pet. Br. 19-20. However, these pre-amendment cases do not provide support for the Solicitor's argument regarding the requirements of Section 706(b). As noted above, the charge-filing requirements were changed substantially by the 1972 amendments and the courts which have interpreted these changes have concluded that the amendments effected a stricter burden on the Commission for the issuance of charges. Accordingly, these pre-amendment cases offer no support for the Solicitor's position.

[9] The *A.E. Staley* decision of the Seventh Circuit, noted above, rejected the employer's argument that a Commissioner's charge must set forth the factual basis on which the charge is based. In doing so, the Seventh Circuit reasoned that to require the inclusion of a factual basis in the charge would be to require the agency to demonstrate probable or reasonable cause before a subpoena may be enforced. However, as noted below, the decision of the Eighth Circuit in the instant case does *not* require a showing of probable or reasonable cause, but requires merely that the express statutory notice requirements of Section 706(b) be met. *See* dissent of Judge Bauer, 32 FEP Cases at 286.

As noted above, Congress intended that the Commission would have authority to act only when a "specific charge" of discrimination was filed. Unlike other federal agencies, such as the Federal Trade Commission (FTC) and the Wage and Hour Administrator of the Department of Labor, the Commission was not given "self-starting" investigatory authority and was to be without authority in the absence of a valid charge. While it is clear from the legislative history of Title VII that the primary, if not the sole, purpose of EEOC Commissioner's charges was the protection of individuals who feared reprisal if they filed a charge, *see Legislative History of Titles VII and XI of the Civil Rights Act of 1964* (EEOC Compilation, printed by W.S. Hein & Co.) at 3305, most Commissioner's charges today are issued pursuant to EEOC's "systemic" program and *not* as a result of an individual charge. *See* EEOC Compliance Manual (BNA), § 16. Thus, unless the Commission is held in a meaningful way to the express charge-filing requirements of Section 706 (b), it will have assumed the very authority which Congress consciously and expressly declined to give it. In order for the "circumstances" requirement of Section 706(b) to have any meaning, it should be interpreted by this Court as requiring the Commission to set forth in the charge in a reasonable manner the factual basis for the allegations of discrimination. Since the "factual basis" underlying the Commissioner's charge is developed by Commission personnel and is included in a "presentation memorandum" which is submitted to the Commissioner along with the proposed Commissioner's charge, *see* EEOC Compliance Manual (BNA), § 16, providing reasonable notice of such "factual basis" should not prove to be disruptive or burdensome.

II. THE POLICY ARGUMENTS ADVANCED BY THE SOLICITOR ARE NOT CONVINCING

The Solicitor has maintained that the decision of the Eighth Circuit will require the Commission to adhere to a "stringent pleading standard" (Pet. Br. 23), and will require the Commission "to show extrinsic evidence of reasonable cause in order to conduct an investigation to determine reasonable cause" (Pet. Br. 34). In addition, the Solicitor has argued that the lower courts' review of the Commissioner's charge was "contrary to the Court's emphatic holding in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) (*"Socal"*), that federal courts may not intrude upon an administrative proceeding at its very outset" (Pet. Br. 42). However, the arguments of the Solicitor misinterpret the Eighth Circuit's decision and provide no persuasive reason why this Court should not interpret the language of Section 706(b) according to its plain meaning.

The decision of the Eighth Circuit neither mandates an unreasonable "pleading requirement" on the Commission, nor does its require the Commission to prove "reasonable cause" or "probable cause" prior to commencing its investigation. Rather, the Eight Circuit's decision merely gives effect in a reasonable fashion to the express "date" and "circumstances" notice requirements of Section 706(b). All that the decision of the Eighth Circuit requires is that the Commission set forth in a reasonably specific fashion the approximate dates of the alleged violations and the factual basis in support of its allegations. Such a requirement will provide the notice to the charged employer contemplated by the clear language of Section 706(b), while not unduly interfering with the authorized functions of the Commission. As noted above, the inclusion of this information in the charge can be accomplished readily since information regarding the "date" and "circumstances" of the alleged violations should be available to the issuing Commissioner in the "presentation memo" accompanying the proposed charge.

The Solicitor's reliance on *Socal* is misplaced for two fundamental reasons. First, the Commission since the 1972 amendments has not been authorized to operate under the largely discretionary "reasonable cause" standard for the issuance of a Commissioner's charge. As noted above, the 1972 amendments set forth express requirements for the issuance of a Commissioner's charge which must be met for a valid charge to issue. Unlike the "reason to believe" standard in *Socal* and the pre-amendment "reasonable cause" standard, the issuance of a charge is not left wholly to the discretion of an individual Commissioner, but rather must meet the explicit requirements of Section 706(b). The second reason that the Solicitor's reliance on *Socal* is not persuasive is that a court which is called upon to enforce a subpoena issued pursuant to a Commissioner's charge *must* determine that the underlying charge is valid before the subpoena may be enforced. *See, e.g., K-Mart, supra*, 694 F.2d at 1061. As noted above, Congress intended that the Commission would have authority to act *only* on a specific charge of discrimination and expressly declined to grant to the Commission the type of self-starting authority possessed by the FTC and certain other federal agencies. Accordingly, a court called upon to enforce a subpoena would abuse its discretion if it did not make an initial determination that the Commissioner's charge was valid. Since this initial determination of the validity of a Commissioner's charge *must* be made in a subpoena enforcement action, the reluctance to interfere in the early stages of the administrative process which this Court expressed in *Socal* simply is not warranted.

CONCLUSION

For the foregoing reasons, EEAC submits that the decision of the Eighth Circuit should be affirmed.

Respectfully submitted,

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